APPEAL AND ERROR—RULE OF DECISION—WHEN TWO TRIALS HAVE OCCURRED IN LOWER COURT.—Section 6363 of the New Code setting forth the rule of decision in the Appellate Court where the evidence is certified reads as follows:

> "When a case at law, civil or criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, * * * the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

This differs from the rule as laid down in the Old Code [1] in several respects, one of the most noticeable changes being that it omits any provisions for cases when there have been two trials in the lower court. It thus becomes unsettled whether the Court will apply the old rule of decision, when the question is directly raised, or whether it will formulate a new one, there being no express provision to govern it. Under the Code of 1904 when there had been two trials in the lower court the rule of decision was expressed in the following language:

> "* * * in which case the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." [2]

In the Revisors' Note to § 6363 the reason given for the omission of this provision is that under the New Code two trials in the lower court will occur in but one rare instance and hence it was not thought necessary to provide for such cases. The words of the Note are:

> "Under section 6251 if a verdict is set aside because contrary to the evidence or without evidence to support it, no new trial is ordered, but final judgment is entered by the trial court. There is no necessity, therefore, for retaining the provision about two trials in the lower court where the verdict has been set aside, for the reason stated, and it has been omitted.
> "Section 6251 is applicable to civil cases only. * * * In the ordinary criminal case the trial court would have no power to grant a new trial at the instance of the Commonwealth, except in cases relating to the State revenue. * * * There will be so few cases of this kind it was not deemed necessary to make special provision for them."

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[1] Code 1904, § 3484.
[2] Code 1904, § 3484.

From this it appears that the Revisors did not contemplate that two trials would occur in the trial court except in the one case mentioned. But it is respectfully submitted that there are other cases in which two trials may occur, for a careful reading of § 6251 discloses that it applies only to civil cases, and that it is only mandatory on the trial court then not to grant a new trial *"if there is sufficient evidence before the court to enable it to decide the case upon its merits."* [3] Furthermore from the very wording of § 6363 it appears that two trials might occur.

> "When a case at law, *civil* or criminal, * * * and a party excepts to the judgment or action of the court in *granting* or *refusing to grant a new trial* * * *" (Italics ours.)

Such words can have no other meaning than that the trial court might in some cases, civil as well as the one criminal case mentioned, grant a new trial. It is even possible that the Appellate Court may send a case back to the trial court for a new trial and two trials in this way occur, since under § 6365 of the Code the Appellate Court renders final judgment whenever in the opinion of the court *the facts before it* are such as to enable it to attain the ends of justice. But cases may arise in which the Court will not have sufficient facts before it, and in such cases new trials must be granted.[4]

What then will be the rule of decision in such cases? Will the Court of Appeals look *only to the evidence on the second trial* as the Revisors' Note indicates will be the rule in cases involving the State revenue or will the Court follow the old rule and first review the evidence of the initial trial? The old rule has already been set forth in this article. What the new rule will be is indicated by the Revisors in the last part of their Note to § 6363, in speaking of cases involving the State revenue, which are the class of cases in which they recognized two trials might occur in the lower court, and is as follows:

> "* * * In such cases, as a writ of error would lie only to the final judgment of the trial court, the appellate court could consider only the evidence introduced on that trial and would not set aside the verdict or judgment on that trial unless it was 'plainly wrong or without evidence to support it.' Attention is called to this so that counsel in the few cases of this nature will observe that *they must not fail on the second trial to introduce the evidence of their defense just as had been done on the first trial.* * * *" (Italics ours.)

This seems to be the only class of cases contemplated by this Note in which there would be two trials in the lower court. Doubtless if other cases had been in mind in which two trials would

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[3] BURKS, PL. & PR. (2nd. ed.) 560, subsection b.
[4] BURKS, PL. & PR. (2 Ed.) 566, 567.

occur the same rule would have been indicated as to them. But what could be the logic in such a course? There would certainly be no advantage in following it when there is every advantage in following the old rule. Furthermore, if this is to be the rule one of the very objects of § 6251 is thereby thwarted. This section gave the trial court the power, under certain conditions, upon setting aside a verdict to render final judgment instead of granting a new trial. The purpose of this section is very plainly stated in the Revisors' Note in the following words:

> "* * * The object is to end the action at once and put the losing party to his writ of error, *thus avoiding the temptation to perjury* and in many cases the unnecessary expense of a second trial * * *" (Italics ours.)

But the trial court cannot always enter final judgment, and to make a party again introduce all of his evidence on a second trial would give an opportunity for just what this section sought to prevent, namely, perjury. The reason for the omission of the provision about two trials, as part of the Revisors' Note above quoted made plain, was because of the insertion of this new section, § 6251 in the Code. It would certainly then seem very futile to insert a new section in the Code, change a subsequent section because of it, and then let the effect of this change be to defeat the purpose of the new section.

Let us consider for a moment what was the probable purpose of the change made by § 6363 in the rule of decision; what was the real object of the statute? We think this is well set forth in the part of the Revisors' Note to that section which reads:

> "The effect of the change is to abolish the rule of decision as on demurrer to the evidence in such a case, and to substitute therefor a much simpler rule."

It was formerly the law that when a party objected to the judgment of a court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it was contrary to the evidence, the rule of decision in the Appellate Court was as on a demurrer to the evidence by the appellant, except where there had been two trials in the lower court, in which case the rule was as stated above.[5] But under the New Code the rule is that "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it".[6] This then is the "much simpler rule" spoken of in the quotation above, and it was for the sole purpose of substituting this new rule, it seems to us, that the statute was changed. Then, it may be asked, why was a provision not made for the case where there has been two trials in the lower

[5] Va. Code 1904, § 3484.
[6] Va. Code 1919, § 6363.

court? As stated before such a provision was not made simply because it seems that it was not thought necessary since it was not contemplated that two trials would occur in the lower court in but one rare instance. In a word the only purpose of the change was to change the manner of reviewing the evidence. But even under the old practice, by the better view, the Appellate Court looked to the evidence in the first trial as the trial court should have viewed it,[7] which is practically the effect of the new rule of decision.[8] Then in view of the object of the change in the rule of decision as set forth above, and in view of the fact that cases involving two trials seem not to have been in the minds of the Revisors (except in the one instance noted), and considering the fact that the "manner" of viewing the evidence on the first trial in cases involving two trials was apparently not changed (if this evidence is viewed), it seems that it may be safely concluded that it was not the purpose of the statute to change the rule of decision for the class of cases under discussion.

If, then, it was not the purpose of the statute to make a change and if a change would make a more complicated practice rather than a simpler one, why should a change be made? Finally, it may be added that the last line of the Revisors' Note to § 6251 states that, "This section should be read in connection with section 6363". If the rule indicated in the note to § 6363 is followed, not only are the two sections not harmonized but one of the objects of § 6251, as has been demonstrated before, is utterly defeated. Therefore, upon every logical consideration it seems that the old rule of decision should be applied.

The point seems not to have been directly raised in the Court but what authority there is upholds the contention made in this article. It is said in Burks' Pleading and Practice:

> "* * * Nevertheless, where there have been two trials in the lower court it would seem that, logically, and independently of the omitted provision, the appellate court, in considering the record, *should look first to the evidence* and *proceedings* on the *first trial.* * * *"[9] (Italics ours.)

[9] BURKS, PL. & PR. (2nd. ed.) 566, note 40.

In the recent case of *Clark* v. *Hugo,*[10] the first trial was had before the New Code went into effect. Consequently when the verdict was set aside a new trial was ordered which trial was had after the New Code went into effect. The case then went to the Court of Appeals and was heard, of course, under the New Code. It was contended that under the present Code the action of the

[7] Humphreys' Adm'x. *v.* Valley R. Co., 100 Va. 749, 42 S. E. 882; Marshall's Adm'x. *v.* Valley R. Co., 99 Va. 798, 34 S. E. 455.

[8] BURKS, PL. & PR. (2nd. ed.) 564, footnote. For discussion of difference in effect of old and new rule of decision see 7 Va. Law Reg. (N. S.) 321, 331.

[10] (Va.) 107 S. E. 730 (1921).

court in setting aside the first verdict could not be inquired into, but the Court decided otherwise, and first considered the case as made at the first trial. The Court did not consider the question at any length and it cannot be stated that the case is more than persuasive authority, as the first trial in the lower court occurred under the Old Code, and therefore it might be said that the parties became possessed of rights which they would not have under the New Code. But the case is certainly very strong persuasive authority and would seem to indicate the decision of the Court when the point is directly raised, where both trials in the lower court have been had under the New Code. However, until the point has been finally decided, it would seem that the safe course for counsel to follow would be the practice indicated by the Revisors, introduce all their evidence on the second trial as well as on the first.

B. D. A.